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No. 08-119

IN THE
Supreme Court of the United States

ROGER DALE LEWIS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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1. The State of Tennessee acknowledges that, under the rule adopted by the Sixth Circuit and six other regional courts of appeals, prosecutors categorically owe no duty "to disclose favorable information that is publicly available." Brief in Opposition (Opp.) 8-9. This public-availability exception to *Brady* v. *Maryland*, 373 U.S. 83 (1963), is so expansive that a prosecutor in these circuits will not be deemed to violate *Brady* even if—as occurred in this case—he falsely assures defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. By reducing *Brady* to a duty to disclose only those documents that rest "within the *exclusive control* of the state," Opp. 10

(emphasis added), the seven circuits that hew to this rule of decision not only radically transform *Brady*'s scope but also invite chaos and confusion in the lower courts. The reason: Courts need to conduct precious line-drawing inquiries into who had access to a document, where was it stored, and how readily available was it.

Four other circuits—the Fourth, Fifth, Ninth, and Tenth—have rejected that rule in favor of a simpler approach and one more faithful to this Court's precedents: Prosecutors must disclose *all* evidence favorable to the accused that they posses, regardless of whether that evidence may also lurk elsewhere in the public domain. That bright-line rule promotes clarity and avoids the temptation for "gamesmanship that *Brady* and its progeny were designed to prevent." Pet. App. 44a (Clay, J. dissenting). It also properly accounts for the different roles and resources of prosecutors and defense counsel. After all, requiring prosecutors to disclose certain evidence that already resides in their files imposes virtually no burden at all—particularly if the prosecutors employ an open-file policy. In contrast, the public-availability rule endorsed by the Sixth Circuit foists on already-overburdened public defenders the duty to comb through public repositories simply to find the same evidence that already exists in the prosecutor's file. And the Sixth Circuit's rule becomes particularly pernicious when, as here, the prosecutor expressly assures defense counsel that all favorable evidence has already been produced. *See Banks* v. *Dretke*, 540 U.S. 668, 969 (2004) (any "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process").

This Court should grant the petition to resolve at long last the question this petition squarely presents: whether the "prosecution's affirmative duty to disclose evidence favorable to a defendant" actually means *all* favorable evidence, *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995), or just the evidence that is "in the *exclusive* control of the state." Opp. 10 (emphasis added). That question has percolated in the regional courts of appeals for years, having now churned an entrenched 7-4 split. Indeed, the State notably does not dispute that six other circuits have endorsed the rule adopted by the Sixth Circuit below. Nor does the State seriously dispute that other circuits have squarely adopted a contrary approach, although it quibbles over meaningless factual distinctions between those cases and this one. Moreover, this case presents an ideal vehicle for resolving that split, given that the State concedes it did not disclose the sole piece of evidence at issue here; the Tennessee appellate court found that the State offered "no explanation" for failing to disclose that evidence, which it recognized was "imbued with impeachment value"; and the State not only failed to disclose information that was theoretically in the public domain but also led defense counsel to believe no such search would be necessary because all favorable evidence had already been disclosed.[1] The petition should be granted.

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[1] See CAJA 266 (affirmative request from defense counsel for impeachment evidence); CAJA 270 (affirmative representation from prosecutor that all impeachment material would be turned over); CAJA 177-184 (Bishop's NCIC report); *Lewis* v. *State*, 2003 WL 22438526, at *7 (Tenn. Crim. App. Oct. 28, 2003) (acknowledgment that State offered "no explanation" for breach of its representation to turn over material "imbued

2. The State dismisses the demonstrated conflict between the Sixth Circuit's ruling and *Strickler* v. *Greene*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004), by asserting that those cases involved "the defendant's reasonable reliance on representations made by the state." Opp. 11 n.2. But this case, of course, involves the same reasonable reliance on representations by the State. Even the State concedes that Lewis's defense counsel requested all exculpatory or impeachment evidence from the prosecutor. Opp. 5. What the State neglects to mention in its opposition is that the prosecutor assured defense counsel that "there is no exculpatory or mitigating evidence known to the State at this time," but "if additional discovery becomes available you will be advised promptly."[2] CAJA 270.

There is thus no meaningful factual distinction between this case on the one hand and *Strickler* and *Banks* on the other. That is important because in those latter two cases, this Court emphasized that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695. But that is precisely the result that the Sixth Circuit's rule sanctions. This Court should

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with impeachment value"); Pet. App. 30a-31a (divided 6-5 en banc decision in *Bell* v. *Bell*); Pet. App. 5a (applying *Bell* to Lewis's *Brady* claim).

[2] The State's duty to disclose would have applied even if Lewis's counsel had not requested the materials. *See Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (citing *United States* v. *Agurs*, 427 U.S. 97, 107 (1976)).

grant the petition to resolve that fundamental tension.

The State's only other attempt to harmonize the Sixth Circuit's rule with this Court's precedents is equally specious. According to the State, *Brady*, *Strickler*, and *Banks* merely require prosecutors to provide criminal defendants with any exculpatory evidence that lies "within the exclusive control of the state." Opp. 10. Not so. That triumvirate of cases make clear that a *Brady* violation has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued," *i.e.*, the materiality requirement. *Strickler*, 527 U.S. at 281-282; *Banks*, 540 U.S. at 691. The Sixth Circuit's position—that a prosecutor is authorized to suppress evidence in its files anytime the defendant could theoretically scrounge together the same facts from somewhere in the public domain—directly conflicts with the Court's clear statement that the second prong focuses solely on the State's conduct in suppressing evidence known to it.[3]

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[3] Because a *Brady* violation is only remediable if a court finds that the suppressed material had a material effect on the trial's outcome, it is not the case that every suppression of evidence by the State will result in an actionable *Brady* claim. The court below never reached the third prong of the analysis, however, because it found the State's failure to turn over the criminal-history report of its star witness did not meet the second prong.

Strickler in fact specifically rejected the argument that the existence of a publicly available newspaper article should have precluded a *Brady* claim that the prosecution suppressed evidence. As the Court explained, nondisclosure by the prosecution is "conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Strickler*, 527 U.S. at 283. Ultimately, *Brady*, *Strickler*, and *Banks* reinforce that the Sixth Circuit's ruling is incompatible with "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281.

3. The opposition also confirms the existence of a deep circuit split with serious ramifications for prosecutorial deception and gamesmanship. Indeed, the State concedes that a split exists, although it insists that the petition "overstates the variance of opinion." Opp. 12. But the petition got the nose-count exactly right. To begin with, the State does not dispute that the Sixth Circuit's decision accords with the law in the First, Second, Third,[4] Seventh, Eighth, and Eleventh Circuits. And its bid to minimize over the split between those courts and the Fourth, Fifth, Ninth, and Tenth circuits only confirms the confusion and conflict in the lower courts of appeals.

Fourth Circuit. In *Walker* v. *Kelly*, 195 Fed. Appx. 169 (4th Cir. 2006), the Fourth Circuit held that the

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[4] The Third Circuit has changed the rule it applies. *See* Pet. 19 & n.4; *see also United States* v. *Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (reversing conviction because prosecution's failure to disclose prior record of key witness was a suppression of evidence in violation of *Brady*).

prosecutor has a duty to disclose *Brady* material, and that not doing so "violat[es] due process, as it condones the prosecutor's ability to conceal documents and requires a defendant to search for *Brady* material." *Id.* at 175 (citing *Strickler*, 527 U.S. at 280, and *Banks*, 540 U.S. at 696). The opposition asks the Court to ignore *Walker* in favor of an earlier Fourth Circuit decision pre-dating both *Strickler* and *Banks*. That makes no sense. *Walker* was decided on remand from this Court "for reconsideration of the *Brady* claim in light of the Court's intervening decision in *Banks* v. *Dretke*, 540 U.S. 668 (2004)." *Walker*, 195 Fed. Appx. at 171. In holding that the focus must be on "prosecutorial misconduct, not on the defendant's diligence," the Fourth Circuit's position stands in stark contrast to the Sixth Circuit's position. *Id.* at 175.

Fifth Circuit. Respondent asserts there is no circuit split involving the Fifth Circuit, yet acknowledges that the Fifth Circuit has held that "if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." *Johnson* v. *Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) (citing *Banks*, 540 U.S. 668, and *Strickler*, 527 U.S. at 280-281); Opp. 16.[5] The Fifth Circuit made this same point in *Mathis* v. *Dretke*, 124 Fed. Appx. 865, 877 (5th Cir. 2005), where it found "unpersuasive the State's argument that they had no duty to disclose

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[5] Contrary to Respondent's suggestion (Opp. 17) the subsequent decision by the Fifth Circuit involved the due diligence standard for successive petitions under the Antiterrorism and Effective Death Penalty Act, not the standard for a *Brady* violation. *See Johnson* v. *Dretke*, 442 F.3d 901 (5th Cir. 2006).

exculpatory evidence that was available in the public record." That the Fifth Circuit reached a different conclusion on the "particular facts" of *United States* v. *Infante*, 404 F.3d 376, 387 (5th Cir. 2005), where the evidence at issue was in the file of an alleged co-conspirator facing "closely related" charges, only underscores the need for uniformity and clarification from this Court.

Ninth Circuit. Respondent next asserts that the Ninth Circuit is not part of a circuit split. That is incorrect. Earlier this year, the Ninth Circuit held that the prosecution violated its *Brady* obligations by failing to turn over criminal-history information regarding its witnesses, requiring a mistrial when that failure was discovered. *See United States* v. *Chapman*, 524 F.3d 1073, 1078 (9th Cir. 2008). Criminal-history information was thus at issue in both *Chapman* and in this case—yet the Sixth and Ninth Circuit reached directly opposite results. In addition, in *Gantt* v. *Roe*, 389 F.3d 908 (9th Cir. 2004), the Ninth Circuit explained that because our system of due process does not permit any rule "declaring 'prosecutor may hide, defendant must seek,' " it is irrelevant whether defense counsel could have independently discovered exculpatory materials that the prosecution suppressed. *Id.* at 913 (quoting *Banks* v. *Dretke*, 540 U.S. 668 (2004)). And it reiterated that defense counsel is entitled to rely on the prosecution's representation that it has complied with Brady. *Id.* The Sixth Circuit, in contrast, held that hide and seek is permissible anytime the hidden information could theoretically be uncovered in the public domain—even if the prosecution assures defense counsel that it has fully disclosed all evidence favorable to the defense.

Tenth Circuit. Finally, Respondent's attempt to reconcile the Tenth Circuit's position with the Sixth Circuit's is also unavailing. Respondent admits that *Banks* v. *Reynolds*, 54 F.3d 1508 (10th Cir. 1995), conflicts with the decision in this case. Opp. 21 n.5. Respondent then extensively quotes from *United States* v. *Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), reinforcing that this case too is in conflict with the Sixth Circuit's decision. The *Quintanilla* court held that whether a defendant knew or should have known of exculpatory evidence "is irrelevant to the prosecution's duty to disclose"—thus creating a direct conflict with the Sixth Circuit. *Id.* at 1149. To be sure, the court went on to note that if a defendant has *actual* knowledge of the evidence, the defendant may be unable to establish prejudice, the third prong of the *Brady* analysis. *Id.* That, of course, makes sense. But there is a colossal difference between a defendant who has actual knowledge of exculpatory information and a defendant who is merely charged with *constructive* knowledge of that information based solely on its theoretical existence somewhere in the public domain.

3. Finally, Respondent does not attempt to dispute that the Sixth Circuit's ruling is inconsistent with the realities of the criminal justice system. Pet. 22-23 & n.5 Forcing resource-strained defense counsel to independently comb the vast public domain for materials with exculpatory or impeachment value that are already known to prosecutors is profoundly unfair to defendants and re-injects the systemic gamesmanship and prosecutorial deception that *Brady* and its progeny sought to eliminate. It is simply not viable in our system of justice to opt for a rule that requires, for

example, the 22 public defenders in the Knox County Tennessee Public Defender office to scour the earth for impeachment material sitting undisclosed in the prosecution's files in each of the 23,000 cases that these 22 attorneys handle every year. *See* Georgia N. Vagenas, American Bar Ass'n, *Indigent Defense: National Developments in 2007*, 22 WTR Crim. Just. 58 (2008); *see also* The Spangenberg Group, Resources of the Prosecution and Indigent Defense Functions in Tennessee (May 2007) (concluding that in Tennessee, where Mr. Lewis's case arose, "indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding"), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf.

The practical realities of the criminal defense system further mandate correction of the erroneous decision below. Prosecutors may not withhold impeachment evidence, mislead the defendant as to the existence of that evidence, and then blame defense counsel for not independently exploring the public domain to confirm that the prosecutor was actually telling the truth. The rule below is antithetical to our system of justice and defendants' due-process rights.

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For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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